

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
JIM BOLLEMA,

Appellant,

V.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 80-193

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal from the assessment of a \$1,000 civil penalty for the alleged violation of RCW 90.48.080, came before the Pollution Control Hearings Board, Nat W. Washington, Chairman, Gayle Rothrock, and David Akana (presiding), at a formal hearing on March 16, 1981, in Seattle, Washington.

Respondent was represented by Charles K. Douthwaite, Assistant Attorney General; appellant was represented by his attorney, Alan K. Foe. Olympia court reporter Kim Otis recorded the proceedings.

Having heard the testimony, having examined the exhibits, and

1 the Board having served its proposed decision on all parties; and the
2 Board having received exceptions from both parties and replies thereto
3 from respondent; and the Board having considered said exceptions,
4 granting them in part and denying them in part, and the Board being
5 fully advised in the premises now makes these

6 FINDINGS OF FACT

7 I

8 On March 21, 1980, after two days of heavy rainfall, a discharge
9 of manure wastes into an unnamed tributary to Allen Creek was observed
10 on appellant Jim Bollema's 220 acre, leased dairy farm near
11 Marysville, Washington. Allen Creek is a part of the public waters of
12 the state. Water samples taken above and below the identified
13 discharge point showed high fecal coliform in the tributary downstream
14 from the discharge. Manure wastes came principally from a cattle
15 bedding area lying to the north of the tributary, and from the general
16 area of the barn lying to the south of the tributary.

17 II

18 On April 1, 1980, respondent conducted a damage assessment to
19 Allen Creek as a result of the discharges observed. Manure and other
20 dairy wastes were observed or detected by its odor far downstream in
21 Allen Creek. Sphaerotilus was observed in portions of the affected
22 channels downstream from the discharge point, but not upstream. Such
23 growth indicates the presence of polluted water over a period of time.

24 The results of the assessment showed that there was nearly a 100
25 percent fish loss in the affected portions of Allen Creek and the

1 unnamed tributary. This loss occurred over a long period of time
2 rather than from the pollution observed on March 21, 1980.

3 III

4 Appellant Bollema's operation was the subject matter of one prior
5 violation which occurred in 1978. That violation was located in a
6 different area than the location of the instant matter. Appellant
7 spent over \$1,400 and three days of his time to remedy the 1978
8 problem. The U. S. Soil Conservation Service provided him with \$740
9 to help pay for the remedial plan.

10 IV

11 For the March 21, 1980, discharge, appellant Bollema was assessed
12 a \$1,000 civil penalty. Appellant sought mitigation of the penalty,
13 which request was considered and denied by respondent. The penalty
14 was thereafter appealed to this Board.

15 V

16 Appellant first occupied the farm on April 1, 1975. He presently
17 is renting the farm on a month-to-month basis. Appellant's possession
18 will terminate in April of 1981 and he will farm elsewhere. He has
19 had between 160 and 200 head of cattle on the 220-acre farm over the
20 period of his occupancy.

21 VI

22 Allen Creek and its tributary involved in this matter is a class
23 AA water. WAC 173-201-070(6). Water quality criteria applicable to
24 such waters sets fecal coliform values of 50 organisms/100 ml, with no
25 more than 10 percent of the samples exceeding 200 organisms/100 ml.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER

1 WAC 173-201-045(1)(c)(i)(A). Appellant's discharge increased the
2 coliform count from negligible upstream to 22,000 col./100 ml
3 downstream.

4 VII

5 Any Conclusion of Law which should be deemed a Finding of Fact is
6 hereby adopted as such.

7 From these Findings the Board comes to these

8 CONCLUSIONS OF LAW

9 I

10 The matter which was found in Allen Creek and the unnamed
11 tributary is a pollutant within the meaning of RCW 90.48.020.¹

12 II

13 No showing of negligence or scienter is necessary for the proving
14 of a violation of RCW 90.48.080 whose terms simply make it unlawful
15 "to cause, permit or suffer" any polluting matter to "drain" into the
16 waters of this state. That statute establishes liability without
17

18 1. RCW 90.48.020 provides in part:

19 Whenever the word "pollution" is used in this
20 chapter, it shall be construed to mean such
21 contamination, or other alteration of the
22 physical, chemical or biological properties, of
23 any waters of the state, including change in
24 temperature, taste, color, turbidity, or odor of
25 the waters, or such discharge of any liquid,
26 gaseous, solid, radioactive, or other substance
into any waters of the state as will or is
likely to create a nuisance or render such
waters harmful, detrimental or injurious to the
public health, safety or welfare,...or to
livestock, wild animals, birds, fish or other
wildlife.

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER

1 fault, or strict liability. Cf. Kaiser Aluminum and Chemical
2 Corporation v. Puget Sound Air Pollution Control Agency, 25 Wn. App.
3 273 (1980).

4 RCW 90.48.080 provides:

5 It shall be unlawful for any person to throw, drain,
6 run, or otherwise discharge into any of the waters of
7 this state, or to cause, permit or suffer to be thrown,
8 run, drained, allowed to seep or otherwise discharged
9 into such waters any organic or inorganic matter that
shall cause or tend to cause pollution of such waters
according to the determination of the commission, as
provided for in this chapter.

10 The preponderance of the evidence shows that the appellant did
11 "permit" and "suffer" a discharge of a matter in the public water of
12 the state that would cause "pollution." "Permit" means "to suffer,
13 allow, consent, let;...to acquiesce, by failure to prevent, or to
14 expressly assent or agree to the doing of an act." BLACK'S LAW
15 DICTIONARY 1298 (4th ed. 1968). See also, "suffer." Id. at 1601.
16 The term "suffer" in RCW 90.48.080 adds a dimension which emphasizes
17 that to "suffer" a discharge can even be done unwittingly. See U.S.
18 v. White Fuel, 6 ERC 1794, 1795 (1974). Thus, respondent does not
19 need to show negligence or scienter by appellant to prove a violation
20 of RCW 90.48.080.

21 III

22 Appellant unlawfully caused, permitted or suffered to be
23 discharged a pollutant into public waters in violation of RCW
24 90.48.080 and for which a civil penalty was properly assessed under
25

1 RCW 90.48.144.²

2 IV

3 Pursuant to RCW 90.48.144, when an appeal is filed, the "penalty
4 shall become due and payable only upon completion of all review
5 proceedings and the issuance of a final order confirming the penalty
6 in whole or in part." Board review of civil penalties, including the
7 amount, is provided by statute to provide for adequate procedural
8 safeguards. See Yakima Clean Air Authority v. Glascam Builders, Inc.,
9 85 Wn.2d 255 (1975). The review conducted by the Board is governed by
10 the procedures for contested cases in the Administrative Procedures
11 Act (ch. 34.04 RCW). Such procedure directs a de novo adversary
12 hearing. San Juan County v. Natural Resources, 28 Wn. App. 796,
13 798-99 (1981). In a penalty matter, respondent carries the burden of
14 proof to establish a violation and a penalty amount appropriate to the
15 situation. One consideration in reviewing the amount of the penalty
16 is to adjust the same to accomplish the purpose of the act enunciated
17
18
19

20 2. RCW 90.48.144 provides in part:

21 "Every person who:...(3) violates the provisions
22 of RCW 90.48.080, shall incur, in addition to
23 any other penalty as provided by law, a penalty
24 in an amount of up to five thousand dollars a
25 day for every such violation.
26

1 in RCW 90.48.010.³ This policy includes maintaining the highest
2 possible standards to insure the purity of state waters, and the
3 propagation and protection of fish and other aquatic life.

4 It is evident that some amount of pollution was entering the
5 waters over a long period of time without the actual knowledge of
6 appellant, although he is deemed to have constructive knowledge of the
7 pollution from the waste which became so much a part of the stream.
8 So much, in fact, that the fish resource has been damaged in the
9 affected area. The pollution event on March 21, 1980, which was
10 caused by the heavy rainfall of the prior two days, was but an
11 exacerbation of the continuing pollution situation. Considering the
12 circumstances and effect of the violation and appellant's past record
13 of one violation at a different location, we conclude, from our
14 perspective and de novo review, that the policies of ch. 90.48 RCW
15 would best be effected if \$500 of the \$1,000 civil penalty assessed
16 were suspended on condition that he not violate any provision of that
17 Act for a period of one year. As so tailored, the penalty will

18
19 3. RCW 90.48.010 provides in part:

20 It is declared to be the public policy of the
21 state of Washington to maintain the highest
22 possible standards to insure the purity of all
23 waters of the state consistent with public
24 health and public enjoyment thereof, the
25 propagation and protection of wild life, birds,
game, fish and other aquatic life, and the
industrial development of the state, and to that
end require the use of all known available and
reasonable methods by industries and others to
prevent and control the pollution of the waters
of the state of Washington.

1 serve as a deterrent in the short term and a warning to appellant in
2 the long term. In all other respects, the action of respondent should
3 be affirmed.

4 V

5 Any Finding of Fact which should be deemed a Conclusion of Law is
6 hereby adopted as such.

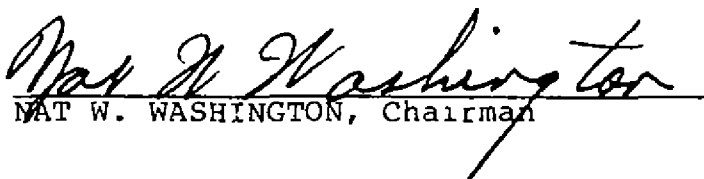
7 From these Conclusions, the Board enters this

8 ORDER

9 The \$1,000 civil penalty (DE 80-260) is affirmed, provided that
10 \$500 of such penalty is suspended on condition the appellant not
11 violate any provision of chapter 90.48 RCW for a period of one year
12 from the date this Order becomes final.

13 DONE this 10th day of June , 1981, in Lacey, Washington.

14 POLLUTION CONTROL HEARINGS BOARD

15 
16 NAT W. WASHINGTON, Chairman

17 
18 DAVID AKANA, Member

19 
20 GAYLE ROTHROCK, Member